

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**MICHELLE D. WILLIAMS**  
Claimant

VS.

**MICHELLE'S BEACH HOUSE**  
Respondent

AND

**ST. PAUL TRAVELERS**  
Insurance Carrier

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Docket No. 1,031,577

**ORDER**

Respondent and its insurance carrier appealed the April 16, 2007, Post-Preliminary Hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

Dennis L. Phelps of Wichita, Kansas, appeared for claimant. William L. Townsley of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

The record on this appeal consists of the transcript of the November 14, 2006, Preliminary Hearing with Claimant's Exhibits 1 through 3 and Respondent's Exhibits 1 through 6; the transcript of the November 16, 2006, deposition of Michelle Borin with Exhibits 1 and 2; the transcript of the November 16, 2006, excerpt of deposition of Michelle Borin; the transcript of the December 1, 2006, deposition of Malissa Letterman; the transcript of the December 1, 2006, deposition of Betty Fischer; the transcript of the December 1, 2006, deposition of Heather Borin; and the administrative record compiled by the Division.

**ISSUES**

Claimant alleges she fell on September 13, 2006, while working for respondent and injured her knees. In the April 16, 2007, Order, Judge Barnes granted claimant's request for medical benefits and temporary total disability benefits.

The only issue on this appeal is whether claimant worked for respondent as an employee or an independent contractor.

Respondent contends claimant was a dancer who worked as an independent contractor because (1) claimant paid respondent a fee whenever she worked, (2) claimant was told when she was hired that she would be an independent contractor, (3) claimant's compensation came directly from respondent's customers in the form of tips and from payments for drinks and private dances, (4) respondent did not provide any benefits to claimant, (5) respondent did not withhold taxes from claimant's earnings and respondent did not furnish claimant with a Form W-2, (6) claimant furnished her own costumes, (7) claimant was free to create her own dance routine and was only prohibited from violating the law, (8) respondent enforced its rules by docking a dancer's tips, and (9) claimant was permitted to bring her own music but she paid a music fee in all events. Respondent argues the *Sizemore*<sup>1</sup> case, which found a dancer who worked at a club was an independent contractor, controls. Consequently, respondent asks the Board to reverse the April 16, 2007, Order.

Conversely, claimant argues the Order should be affirmed. Claimant argues she should be considered an employee of respondent for purposes of the Workers Compensation Act because (1) the Act should be liberally construed to bring employers and employees within its provisions, (2) dancing is an integral part of respondent's business as a gentleman's club, (3) claimant was hired after preparing an employment application, (4) at the time of claimant's hire, there was no written document or agreement that claimant would work for respondent as an independent contractor, (5) respondent had the right to hire or immediately fire its dancers, (6) claimant had no supervisory control over other dancers, (7) respondent maintained control over claimant's work as it scheduled claimant's shifts and controlled the order of when claimant danced and to some extent controlled what claimant wore, and (8) except for costumes, respondent provided all the necessary equipment and amenities that were integral to claimant's work, such as disk jockeys, music, advertising, stage props, sound equipment, dressing rooms, stage, and patrons.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the record compiled to date and considering the parties' arguments, this Board Member concludes the April 16, 2007, Order should be affirmed.

Respondent operates a club in Derby, Kansas, where patrons purchase drinks and watch young women dance. For purposes of this appeal, the parties do not dispute that claimant fell while working for respondent on September 13, 2006, and injured her knees.

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<sup>1</sup> *Sizemore v. Jezebel's*, No. 96,537 (Kansas Court of Appeals unpublished opinion filed March 2, 2007); *Sizemore v. Jezebel's*, No. 1,021,164, 2006 WL 1275453 (Kan. WCAB April 28, 2006).

The only issue on this appeal is whether claimant worked for respondent as an employee or as an independent contractor for purposes of the Workers Compensation Act.

The Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions and protections.<sup>2</sup>

It is often difficult to determine in a given case whether a person is an employee or independent contractor because there are elements pertaining to both that may occur without being determinative of the relationship.<sup>3</sup> There is no absolute rule for determining whether an individual is an independent contractor or an employee.<sup>4</sup>

The relationship of the parties is dependent upon all the facts and the label that they choose to employ is only one of those facts. The terminology used by the parties is not determinative of whether an individual is an employee or an independent contractor.<sup>5</sup>

The primary test used by the courts in determining whether the employer-employee relationship exists is whether the employer has the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed. It is not the actual interference or exercise of the control by the employer but the existence of the right or authority to interfere or control that renders one a servant rather than an independent contractor.<sup>6</sup>

In addition to the right to control and the right to discharge a worker, other commonly recognized tests of the independent contractor relationship are: (1) the existence of a contract to perform a certain piece of work at a fixed price; (2) the independent nature of the worker's business or distinct calling; (3) the employment of assistants and the right to supervise their activities; (4) the worker's obligation to furnish tools, supplies, and materials; (5) the worker's right to control the progress of the work; (6) the length of time that the worker is employed; (7) whether the worker is paid by time or by the job; and (8) whether the work is part of the regular business of the employer.<sup>7</sup>

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<sup>2</sup> K.S.A. 2006 Supp. 44-501(g).

<sup>3</sup> *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

<sup>4</sup> *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

<sup>5</sup> *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

<sup>6</sup> *Wallis*, 236 Kan. at 102-103.

<sup>7</sup> *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

Nearly all the above factors indicate claimant worked for respondent as an employee rather than an independent contractor. Respondent retained the right to control claimant's work as it scheduled her work hours and retained the right to immediately terminate her services. Claimant did not have the right to control the progress of her work as she was obliged to follow a schedule set by respondent. Respondent's control over claimant even extended to the clothing claimant wore. More importantly, the work claimant performed was an essential part of respondent's business as a gentleman's club, which could not carry on that type of business without its dancers.

Moreover, claimant did not operate an independent business or work as a dancer apart from respondent, nor did she hire assistants. Respondent employed claimant on an ongoing basis rather than for a certain piece of work at a fixed price. Other than claimant's costumes, respondent provided the stage, props, sound equipment and other amenities required for claimant to work.

Perhaps the only factors that would indicate claimant was not an employee was the manner in which claimant was paid and the fact she had to pay respondent a fee each time she worked. All of the monies claimant received came from respondent's patrons. Claimant received tips for dancing on stage along with a portion of the price charged for drinks that patrons purchased for her and a portion of the fees charged for personal dances. But the source of income is only one of the factors to consider in analyzing an employment relationship. If source of income was the only determining factor, most waiters and waitresses would not have coverage under the Workers Compensation Act.

Finally, this claim is distinguishable from *Sizemore*<sup>8</sup> as the Kansas Court of Appeals in that decision found the majority of factors considered above supported the finding that claimant was an independent contractor. But in this claim this Board Member concludes those same factors support the finding that claimant worked for respondent as an employee.

In conclusion, claimant's relationship with respondent was more in the nature of an employee than an independent contractor. Consequently, the April 16, 2007, Order should be affirmed.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.<sup>9</sup> Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted

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<sup>8</sup> *Sizemore v. Jezebel's*, No. 96,537 (Kansas Court of Appeals unpublished opinion filed March 2, 2007).

<sup>9</sup> K.S.A. 44-534a.

by K.S.A. 2006 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

**WHEREFORE**, the undersigned affirms the April 16, 2007, Post-Preliminary Hearing Order entered by Judge Barnes.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July, 2007.

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BOARD MEMBER

c: Dennis L. Phelps, Attorney for Claimant  
William L. Townsley, Attorney for Respondent and its Insurance Carrier  
Nelsonna Potts Barnes, Administrative Law Judge